

**A bilateral treaty developing legal effects *erga omnes*?  
Reflections on the Prespa Agreement between Greece and North  
Macedonia settling the name dispute**

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**1. Introduction**

The dispute between Greece and its neighbour – henceforth called ‘North Macedonia’ and formerly known, depending on the context and the actors involved, as the ‘Former Yugoslav Republic of Macedonia’ (FYROM) or the ‘Republic of Macedonia’ – over North Macedonia’s name lasted for over 27 years. This bilateral dispute may serve as a good example of how ingenious States can be when it comes to finding ways to create tensions in their international relations. Yet, one must not underestimate the special political or symbolic weight inter-state disputes of that type may have for nations. This is evidenced by the long-awaited Final Agreement (hereinafter the Prespa Agreement or the Agreement)<sup>1</sup> signed on 12 June 2018 by Greece and North Macedonia at the Prespa Lake. With this bilateral international treaty, which entered into force on 12 February 2019, the two States declared their differences to be resolved ‘in a dignified and sustainable manner, having in mind the importance of the issue and the sensitivities of each Party’.<sup>2</sup> The main provision settling

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<sup>1</sup> Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council resolutions 817 (1993) and 845 (1993), the Termination of the Interim Accord of 1995, and the Establishment of a Strategic Partnership between the Parties. For the text see Identical letters dated 13 February 2019 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, UN Doc A/73/745-S/2019/139 (14 February 2019), annex I.

<sup>2</sup> *ibid* preamble, indent 10.

the dispute over North Macedonia's name is contained in Article 1(3) of the Agreement, which reads:

'Pursuant to those negotiations the following have been mutually accepted and agreed: a) The official name of the Second Party shall be the "Republic of North Macedonia" which shall be the constitutional name of the Second Party and shall be used *erga omnes*, as provided for in this Agreement'.<sup>3</sup>

This provision contains two intertwined elements that Greece considered as preconditions for agreeing to be bound by the Prespa Agreement. First, according to the Agreement, the Second Party (i.e. North Macedonia)

'shall adopt "Republic of North Macedonia" as its official name and the terminologies referred to in Article 1(3) through its internal procedure that is both binding and irrevocable, entailing the amendment of the Constitution as agreed in this Agreement'.<sup>4</sup>

Thus, North Macedonia committed to amend its national constitution (which is not as rare as it may look at first glance) as a means to modify its name (which is probably unprecedented). For that purpose, a referendum<sup>5</sup> was organised in North Macedonia which, according to some authors, was conducted in a legally dubious manner.<sup>6</sup> The timeframe within which North Macedonia had to amend its constitution was strict, as it was planned to conclude *in toto* the constitutional

<sup>3</sup> The agreement specifies also the terminologies that must be used in this context, ie that the nationality of the second party shall be "Macedonian / Citizen of the Republic of North Macedonia" and the official language of the same party shall be the "Macedonian language". Both terminologies are to be used according to art 7 of the agreement. See art 1(3)(b)-(d). Art 7 provides that the understanding of the name 'Macedonia' and 'Macedonian' by the two parties refers to a different historical context and cultural heritage. In particular, these terms, including the terms in relation to the language of North Macedonia, denote characteristics distinctly different from the ancient Hellenic civilization, history, culture and heritage of the northern region of Greece.

<sup>4</sup> Art 1(3)(g).

<sup>5</sup> Under the Agreement, the Second Party had the right to hold a referendum, see art 1(4), c) and art 1(11).

<sup>6</sup> See for instance A Syrigos, E Hatzivassiliou, *The Prespa Agreement and the Macedonian Question*, Athens, Patakis Publishers, 2019 (in Greek), pp. 101-104. See also the Russian position *infra*, 4.3.

amendments<sup>7</sup> by the end of 2018, i.e. before the Prespa Agreement was ratified. Completing the process of constitutional reform was a precondition for Greece to ratify the Agreement,<sup>8</sup> and so for its entry into force. Moreover, North Macedonia had to incorporate within its constitution the new name and terminologies agreed upon ‘*en bloc* with one amendment’.<sup>9</sup>

The second and most important feature is that the Agreement is premised upon the idea that amending North Macedonia’s constitution alone does not suffice to settle the dispute between the two States. To that end, the agreement established a framework designed to avoid the confusion that would arise from the use of different names in different contexts by different actors, the ultimate aim being to ensure that one single name, i.e. North Macedonia’s constitutional name, will be used by all actors *vis-à-vis* all other actors, in any imaginable context, both domestically and internationally, that is to say, *erga omnes*.

It is neither necessary nor possible to go here into the details of the domestic political reactions to the Prespa Agreement within the two involved States or to engage in a global assessment of the solution agreed by Greece and North Macedonia. After receiving – in accordance with Article 20(6) of the Agreement – a letter dated 12 February 2019,<sup>10</sup> whereby the two contracting parties informed him of the entry into force of the Prespa Agreement, the UN Secretary General made a public statement on 13 February 2019 welcoming the Agreement and calling on ‘Member States, regional organizations and all international partners to support the historical steps that the parties have taken’.<sup>11</sup> Nevertheless, the somewhat baroque architecture of the Agreement – which is discussed in more detail in the following paragraphs – gives rise to a number

<sup>7</sup> It should be noted here that the constitutional amendments did not only concern the name, but also other provisions of the North Macedonian Constitution, namely its preamble and Articles 3 and 49, which Greece perceived as containing potential territorial claims by its North Macedonia.

<sup>8</sup> Art 1(4)(f).

<sup>9</sup> Art 1(12).

<sup>10</sup> For the text of this letter see the aforementioned UN Doc A/73/745-S/2019/139 (14 February 2019) annex II.

<sup>11</sup> ‘Secretary-General Congratulates Greece, Republic of North Macedonia on Settling Long-Standing “Name” Dispute, as Agreement Enters into Force’ SG/SM/19460 (13 February 2019) see <[www.un.org/sg/en/content/sg/statement/2019-02-13/statement-attributable-the-spokesman-for-the-secretary-general-prespa-agreement](http://www.un.org/sg/en/content/sg/statement/2019-02-13/statement-attributable-the-spokesman-for-the-secretary-general-prespa-agreement)>.

of complex questions. There are two main reasons for this. First, questions are raised because of the explicit use in the Agreement of the highly ambiguous term *erga omnes*, which seems to be unprecedented in international practice. Second, questions are raised because the Agreement contains provisions regarding the use of the name ‘North Macedonia’ that may concern third parties, namely States and international institutions.<sup>12</sup> Thus, the Prespa Agreement raises a number of broader theoretical questions pertaining to the effects this bilateral treaty may have for third States and to the meaning of the term *erga omnes* in this particular context. That being explained, the Prespa Agreement serves here as an example and a useful case study offering the opportunity to examine the meaning of *erga omnes* in this particular context and the possible obligations for third states on a more theoretical level.

*Erga omnes* is a relatively abstract concept that can have different meanings in international law. It can be defined in a very general way as follows:

‘Translated literally, “*erga omnes*” means “against all”, “between all”, or “as opposed to all”. An obligation of international law that has *erga omnes* effects thus applies between all, or to all, others – presumably all other members of the international community as a whole’.<sup>13</sup>

With this definition in mind, the main question to be examined in this study is *who is bound by the Agreement*. In different terms, the key question explored below is who has an obligation under the Prespa Agreement to employ the new name of ‘North Macedonia’ and *vis-à-vis* which other international actors? As is common knowledge, the general

<sup>12</sup> This study does not deal with the question of the legal effects of the Agreement on private entities or individuals. The Agreement contains certain provisions supporting the idea that private parties have no obligation to use the new name. Art 1(3)(f) provides for instance that other adjectival usages of the new name ‘including those referring to private entities and actors, that are not related to the State and public entities, are not established by law and do not enjoy financial support from the State for activities abroad, may be in line with art 7(3) and (4)’. At the same time, art 1(3)(h) provides that ‘the Parties agree to support and encourage their business communities to institutionalise a sincere, structured and in good faith dialogue, in the context of which will seek and reach mutually accepted solutions on the issues deriving from the commercial names, the trademarks, the brand names and all relevant matters at bilateral and international level’.

<sup>13</sup> C J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2010) 101, giving a typology of different legal effects *erga omnes*, chapter 3.

rule regarding the effects of a treaty on third parties is embodied in Article 34 of the two Vienna Conventions on the Law of Treaties (VCLT), namely the 1969 convention on inter-state treaties and the 1986 convention on treaties involving international organisations.<sup>14</sup> The golden rule is that a treaty cannot establish obligations or rights for a third State or organisation without their consent. This rule is reflected in the maxim *pacta tertiis nec nocent nec prosunt* (hereinafter “*pacta tertiis* rule”), which is part of international customary law. Could the Prespa Agreement be read as lawfully departing from or establishing exceptions to this rule?

As to the structure of the analysis that follows and the more concrete questions it addresses, Part 2 offers some basic background information regarding the dispute between Greece and North Macedonia over the latter’s name and its course of evolution, focusing in particular on the judgment the ICJ delivered in 2011 regarding one particular aspect of the dispute between the two States. Part 3 explores whether the Agreement creates an obligation *erga omnes* for the parties alone, in other words whether the obligation of the parties to the Agreement to use the new name ‘North Macedonia’ is owed to all other third parties such as States and international institutions, which would then be entitled to demand performance of that obligation. Part 4 deals with the most important question arising from the Prespa Agreement, namely if this instrument creates obligations for (potentially all) third parties, i.e. subjects that are not parties to the Agreement because they have not consented to be bound by it and for which that treaty is not in force.<sup>15</sup> In other words, could the Prespa Agreement be read as establishing an objective regime that creates an obligation for all third parties to use the new name without/against their consent? Moreover, can the Agreement develop *erga omnes* opposability in the sense that third parties – irrespective of whether they are bound to use the new name (i.e. North Macedonia) or not – are not allowed to challenge the use of said name by the two parties (ie North Macedonia and Greece) or other third parties as the case may

<sup>14</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, (adopted 21 March 1986, not yet in force).

<sup>15</sup> See art 2 (1)(g) and (h) of the Vienna Convention on the Law of Treaties of 1969 and of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

be? Part 5 discusses a different hypothesis. Considering that this Agreement has been negotiated under the auspices of the UN, the question that begs an answer is whether a future UNSC resolution endorsing this instrument can establish an objective legal framework, i.e. valid, binding and opposable *erga omnes*. Part 6 offers some concluding remarks.

## *2. The dispute over North Macedonia's name: basic background information and its (judicial) course of evolution*

In September 1991, when the Yugoslav federation started to collapse, the Socialist Republic of Macedonia – which shared a border with Greece – declared its independence under the name ‘Republic of Macedonia’. Greece protested immediately on the grounds that the use of the name ‘Macedonia’ – which is historically associated with ancient Greek history and civilisation and which, geographically, is part of the Greek territory, i.e. there is a region called Macedonia in Greece –, as well as certain provisions of the newly adopted Constitution and symbols of this State, clearly constituted an attempt to stir revisionist territorial claims against Greece.<sup>16</sup> Due to this peculiar dispute, the United Nations Security Council (UNSC) delivered resolution 817 (1993) – explicitly under Article 4 (governing the procedure for the admission of a new member), but implicitly also under Chapter VI (pacific settlement of disputes) of the Charter – recommending to the United Nations General Assembly (UNGA) that the State whose name was in dispute ‘be admitted to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as “the Former Yugoslav Republic of Macedonia” pending the settlement of the difference that has arisen over the name of the State’.<sup>17</sup>

The UNGA admitted FYROM under this provisional name.<sup>18</sup> In 1995, Greece and FYROM signed the Interim Accord which provided that the former state recognised the latter as an independent and

<sup>16</sup> See in more detail P Pazartzis, ‘La reconnaissance d’“une république yougoslave”: la question de l’ancienne République yougoslave de Macédoine (ARYM)’ (1995) *Annuaire Français de Droit International* 281-297, 284-288.

<sup>17</sup> S/RES/817(1993) (7 April 1993) para 2.

<sup>18</sup> A/RES/47/225 (8 April 1993).

sovereign state under the provisional designation FYROM.<sup>19</sup> In addition, by means of Article 11(1) of the Interim Accord, Greece agreed to refrain from objecting to the application by or the membership of FYROM ‘in international, multilateral and regional organizations and institutions of which’ Greece was a member. However, under the same provision, Greece ‘reserve[d] the right to object to any membership referred to above if and to the extent the [... FYROM] is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)’.

The exact meaning and scope of this exception was at the heart of the 2011 judgment, whereby the ICJ found that, by opposing to FYROM’s admission to NATO at the 2008 Bucharest Summit of the North Atlantic Treaty Organization (NATO), Greece breached the Interim Accord.<sup>20</sup> The ICJ noted that the Parties agreed on the interpretation of the exception contained in Article 11(1) of the Interim Accord in one case: Greece was allowed to object to FYROM’s admission to an organisation if FYROM was ‘to be referred to by the organization itself other than by the provisional designation’.<sup>21</sup> But Greece asserted that it had the right to object in two other cases as well: first, if FYROM referred to itself in the organisation using its constitutional name (i.e. Macedonia) and, second, if third States referred to FYROM within the organisation by its constitutional name.<sup>22</sup> The Court held that it was not necessary to decide on the last scenario<sup>23</sup> and focused on the question of whether Greece could lawfully object to FYROM joining NATO if the latter intended to refer to itself within NATO after being admitted to it by its constitutional name, instead of using the provisional designation set by UNSC resolution 817.

<sup>19</sup> Interim Accord (with related letters and translations of the Interim Accord in the languages of the Contracting Parties) signed at New York on 13 September 1995, 1891 UNTS art 1(1) and the letter of the Greek Minister of Foreign Affairs stating that Greece recognised the Second Part ‘with the provisional name of the former Yugoslav Republic of Macedonia pending settlement of the difference that has arisen over the name of the State’.

<sup>20</sup> *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644 paras 62-113.

<sup>21</sup> *ibid* para 89.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid* para 90.

Without getting into the details of this ICJ judgment, it is useful to recall that the Court held that paragraph 2 of resolution 817 was ‘directed primarily to another organ of the United Nations, namely the General Assembly, rather than to individual Member States’. Moreover, it acknowledged that the wording of the same provision was ‘broad — “for all purposes” — and thus could be read to extend to the conduct of Member States, including the Applicant, within the United Nations’.<sup>24</sup> The Court examined the subsequent practice of the Parties to the Interim Accord and observed that Greece did not object to the admission of FYROM to any of the 15 organisations which the Applicant joined under the provisional designation prescribed by resolution 817, despite the fact that the Applicant (i.e. FYROM) continued to refer to itself within these organisations by its constitutional name (i.e. Macedonia).<sup>25</sup>

Based, *inter alia*, on this ground, the Court concluded that the exception contained in Article 11(1) did not allow Greece to object to FYROM’s admission to NATO given ‘that the Applicant’s intention to refer to itself in an international organization by its constitutional name did not mean that it was “to be referred to” in such organization “differently than in” paragraph 2 of resolution 817’.<sup>26</sup> This finding seems to support the idea that, although UNSC resolution 817 is binding upon UN organs and may also have been perceived by other international institutions as binding, this resolution did not create an obligation for the interested State (i.e. FYROM, now named North Macedonia) and other UN Member States – most of which had already recognised FYROM with its constitutional name (i.e. Macedonia) at a bilateral level –, to use the provisional name FYROM. The judgment of the ICJ illustrates the complex problems arising from the naming dispute. In a nutshell, this particular ICJ judgment concerned a quite specific and, for some, perhaps even futile problem stemming from the dual denomination in international relations by different actors, in different contexts of the exact same State. It is this name imbroglio that the Prespa Agreement is designed to settle once and for all.<sup>27</sup>

<sup>24</sup> *ibid* para 93.

<sup>25</sup> *ibid* para 99.

<sup>26</sup> *ibid* para 103. Cf also paras 98 and 101.

<sup>27</sup> The Agreement addresses other issues related to co-operation between the two States that do not need to be discussed here.



### 3. An agreement creating an obligation erga omnes solely for the parties?

Like any other treaty, the Prespa Agreement contains obligations that the parties must perform in good faith according to Article 26 of the VCLT that embodies the *pacta sunt servanda* principle.<sup>28</sup> But the Agreement's idiosyncrasy lies in the employment of the term *erga omnes* twice concerning the use of the new name. The first instance has already been mentioned. The main provision, i.e. Article 1(3) of the Agreement, provides that the new constitutional name of North Macedonia 'shall be used *erga omnes*'. However, this provision does not specify by whom this name shall be used or what exactly this *erga omnes* use implies. As far as the second use of the term *erga omnes* is concerned, this is found in Article 1(8) of the Prespa Agreement, which reads:

'Upon entry into force of this Agreement and taking into account its Article 1(9) and (10),<sup>29</sup> the Parties shall use the name and terminologies of Article 1(3) for *all* usages and *all* purposes *erga omnes*, that is, domestically, in *all* their bilateral relations, and in *all* regional and international Organizations and institutions' (emphasis added).

Therefore, this provision establishes the same obligation on the two parties to the Agreement while specifying the meaning of the term *erga omnes*. The parties must use the new name domestically, i.e. in their domestic legal orders, in all their bilateral relations – although it is not clear if this applies only to their relations *inter se* or equally to their bilateral relations with third States – and within all international organisations. Moreover, the fact that this obligation applies 'for all usages and all purposes' seems to cover not only all kinds of official documentation but also verbal references to North Macedonia by the organs of the two States.<sup>30</sup>

<sup>28</sup> 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

<sup>29</sup> These provisions concern the use of the new name and terminologies agreed upon internally, in all new official documentation, correspondence and relevant materials and fix the transitional periods within which the same party must proceed to the modification of its existing official documents.

<sup>30</sup> It would seem that all State organs of both parties are under the obligation to use the new name, including courts. However, it is not entirely clear if members of the parliament of the two States parties are under the same obligation. In principle, this is doubtful because acting in their individual political capacity they cannot be deemed to

Moreover, this provision clarifies and reinforces another provision in the text of the Agreement. Thus, according to Article 1(5):

‘Upon entry into force of this Agreement, the Parties shall use the name and terminologies of Article 1(3) in *all* relevant international, multilateral and regional Organizations, institutions and fora, including *all* meetings and correspondence, and in *all* their bilateral relations with *all* Member States of the United Nations’. [emphasis added]

Thus, this provision makes clear, albeit without using the expression ‘for all usages and all purposes’ or the term *erga omnes*, that the new name is to be used in written or oral form (*all* meetings and correspondence) within international institutions and other fora –which most probably means entities not having the status of an international organisation *stricto sensu* or, more generally, an international legal personality similar to that of international organisations. Unlike Article 1(8), the wording of Article 1(5) clearly covers the bilateral relations of the two parties with all other Members States of the UN. At the same time, Article 1(7) provides that, upon entry into force of the Agreement, the previous two names, i.e. the old constitutional one (Macedonia) and the provisional one (FYROM) ‘shall cease to be used to refer to the Second Party [i.e. North Macedonia] in any official context’. Yet, this provision does not make it clear who is under this obligation to refrain from using the previous two names. Moreover, the provision seems to be redundant because the obligation to use the new name implies an obligation to refrain from using the previous ones. However, despite this complex set of partially overlapping arrangements (*ex abundanti cautela?*) in Articles 1(5) and 1(8) and the difficulties that surround the identification of the exact scope of Article 1(7), it can be argued that, when combined, these provisions establish one single, essentially identical obligation for the two parties to use the new name ‘North Macedonia’ in all official contexts. The recurrent use of the word ‘all’ and the expression *erga omnes* support this conclusion.

act on behalf of the legislature and thus of their respective State. The question of whether a member of the parliament calling North Macedonia by a different name can engage the responsibility of the State is a matter of attribution of wrongful conduct governed by the law of state responsibility and cannot be further examined here.



However, one may ask if from a theoretical point of view this common obligation of the parties to perform a specific act, – i.e. to use the new name *erga omnes*, domestically, in their mutual relations and internationally, *vis-à-vis* all third parties, in *all* their dealings with *all* States and *all* international institutions, for *all* usages and *all* purposes –, qualifies as an obligation *erga omnes*. To answer this question, it is essential to keep in mind that the concept of *erga omnes* has two different, albeit closely related, meanings. First, characterising a rule of international law as *erga omnes* would simply mean that it is binding all States as is undeniably the case of customary international law. However, the fact that a rule of customary law binds all States (or is opposable to all States, i.e. *erga omnes*) does not automatically give rise to obligations owed *erga omnes*, i.e. *vis-à-vis* all other States. The reason is that an (alleged) breach of a customary rule establishes in principle a bilateral relationship between the author of the wrong and the injured party, which alone has the right to invoke responsibility.<sup>31</sup> It is one thing to say that all subjects are bound by the rule; it is another thing to say that a breach of a generally binding rule by one of them may authorise all other subjects to react. Outside of its meaning in the field of primary rules of international law, the concept of obligations *erga omnes* is clearly established within the framework of the secondary rules of international law that govern State responsibility.<sup>32</sup> As defined by the ICJ in *Barcelona Traction*, obligations *erga omnes* are the obligations a State has ‘towards the international community as a whole’; ‘[B]y their very nature [such obligations] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection’.<sup>33</sup> Similarly, obligations owed *erga omnes partes* are created by means of a treaty which aims at protecting common interests. This ‘implies that the obligations in question are owed by any State party to all the other States parties to the Convention’ or, in other words, that ‘each State party has an interest in

<sup>31</sup> See also C Tams (n 13) 102.

<sup>32</sup> See *ex multis* P Picone, *Comunità internazionale e obblighi “erga omnes”* III ed. (3 edn, Napoli 2013); P Picone ‘Gli obblighi *erga omnes* tra passato e futuro’ (2015) 98 *Rivista di Diritto Internazionale* 1081; C Tams (n 13) *passim*.

<sup>33</sup> *Barcelona Traction, Light and Power Company, Limited, Judgment (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 para 33.

compliance with them in any given case'.<sup>34</sup> The main, albeit not only, legal consequence of obligations *erga omnes* in this sense concerns the rules regulating who has the right to invoke the international responsibility of the wrongdoer. Thus, obligations *erga omnes* (*partes*) have a fundamentally procedural dimension as they confer a right on all States (parties to a treaty) other than the State directly injured (or in the absence thereof) to invoke the responsibility of a State that has allegedly breached an obligation it 'owe[s] to the international community as a whole' or to all other parties to a treaty.<sup>35</sup> Put differently, an obligation owed *erga omnes* that has been established by means of customary international law, creates a corresponding procedural right *omnium*.

Does the obligation of the two parties to the Prespa Agreement to use North Macedonia's new constitutional name in their relations with all other States or international institutions amount to an obligation they owe to these other third parties? For instance, if one of the two parties to the Prespa Agreement fails to employ the name 'North Macedonia' in its correspondence or when its representatives take the floor at a conference within the framework of an international institution, who is entitled to invoke state responsibility? Obviously, each party to the Prespa Agreement is entitled to invoke responsibility and protest if the other party fails to employ the newly agreed name of North Macedonia in either their *inter se* relations or, more broadly, in the context of relations with third parties. But does this also mean that, in the event of an alleged breach of the obligation to use the new name, third parties would be entitled to demand performance of the obligation or invoke the responsibility of the wrongdoer on the grounds that the obligation to employ the new name is not only due to the other party to the Prespa Agreement but also to the international community as a whole?

Obviously, answering this set of questions is not an easy task. The argument made in this study is that the obligation to use the new name cannot be characterised as a *customary* obligation *erga omnes* as defined by the ICJ in *Barcelona Traction*. However, Greece and North Macedonia may have intended to establish by means of a *treaty* provision an

<sup>34</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 para 68 (see also para 69).

<sup>35</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) vol II/2 YBILC 121 (art 48).

obligation *erga omnes*, in the sense that the obligation to use the new name is owed to all third parties. The following analysis focuses on these two scenarios.

As far as the first scenario regarding the traditional concept of obligations *erga omnes* is concerned, there are quite a few good reasons as to why this should be rejected. Indeed, a *bilateral* treaty – destined to settle a dispute – cannot give rise to customary obligations *erga omnes*. Customary law binds all legal subjects. Unlike ordinary customary rules, customary obligations owed *erga omnes* give rise to a universal legal standing in the event of a breach. Thus, *as such*, the treaty-stemming obligation of the parties to the Prespa Agreement to use the new name *erga omnes* is incapable of producing such an effect. That is, the obligation stemming from the Prespa Agreement to use the new name *erga omnes* does not bind non-parties and is not invocable by all against all in case of breach. The provisions at issue impose duties on the parties alone –not to third parties (a question addressed separately in the Agreement and discussed later in this study).

Admittedly, in theory, state practice and *opinio juris* may allow a rule stemming from a bilateral treaty to transform into customary law that binds third States and even produces *erga omnes* effects enabling all States to invoke responsibility. As is also explained below (Part 3.1.), this would be no exception to the *pacta tertiiis* rule. However, obligations *erga omnes* (*partes*) are fundamentally designed to protect general interest and common values of the international community. The pacific settlement of disputes is unquestionably of paramount importance to the international community. Yet, although it is not legally impossible, it is rather unlikely that a bilateral treaty settling a dispute and establishing a specific obligation for the parties alone to perform an act *erga omnes* can produce universal *erga omnes* legal effects in the sense of giving rise to a customary rule, the breach of which authorises all States to invoke state responsibility.

These arguments appear to give sufficient support to the conclusion that the obligation of Greece and North Macedonia to use the new name cannot be considered as a customary obligation *erga omnes* destined to protect common interests/values of the international community.

However, moving to the second scenario, there are still other possibilities – albeit questionable ones. A treaty-stemming obligation concerning the relationship *inter se* between the two parties to the treaty could give rise also to an obligation *erga omnes* in that sense that, in case of



breach, it confers a corresponding procedural right *omnium*. Admittedly, there is nothing to prevent two (or more) States from intentionally conferring through a treaty a right on (all) other third parties. According to Article 36 (1) of the VCLT

‘[a] right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, *or to all States*, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides’ (emphasis added).

In our case, the relevant provisions of the Prespa Agreement may be read as conferring on all third States (and/or international organisations) the right to demand performance of the obligation of Greece and North Macedonia to use the new name they agreed on. However, a more careful examination of this hypothesis reveals its inapplicability in our case. First, one must be cognizant of the difficulties pertaining to the establishment of the true intention of the parties to a treaty,<sup>36</sup> especially when the wording of the treaty is not conclusive. Beyond that, the key problem here would be the nature of the right that the parties may intend to confer on all third parties. The wording of Article 36 of the VCLT seems to cover only cases where the parties intend to accord to third parties a specific *substantive, primary* law right (e.g. a right of passage over their territory) on the basis of the presumed assent of these parties. By contrast, it is not applicable to the *procedural* right to demand performance of an obligation or to invoke responsibility in the event of an alleged breach thereof. These rights are based on *secondary* law. Therefore, they derive from and depend on the nature of the primary obligation. Suffice it to remind in that respect that secondary obligations are not autonomous from primary obligations. Therefore, the key question is not whether North Macedonia and Greece intended to confer on all third parties a procedural right *omnium* to invoke their responsibility if one of the two breaches the obligation to use the new name. The key issue is whether their intention was to

<sup>36</sup> In fact, the parties to the treaty must have manifested their intention to create a right ‘in some visible form’ and with a ‘necessary degree of precision’, see A Proelss, ‘Article 36’, in O Dörr, K Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2nd edn, Springer 2018) 718.

be bound by a substantive obligation not only *inter se* but also *vis-à-vis* all other third parties.

Therefore, another possibility must be explored. If, because it is a bilateral treaty, the Prespa Agreement cannot establish a procedural right for non-parties to invoke the responsibility of one of the two parties to this Agreement, one might be prompted to consider a different path of analysis. The argument could be made that, to the extent that the performance of the Prespa Agreement evidently involves third parties, the source of the obligation to use the new name is not found in treaty law (i.e. the bilateral Prespa Agreement between Greece and North Macedonia *as such*), but in a joint unilateral act contained in that treaty. This would mean that, by means of their bilateral treaty, the parties did not only intend to be bound *inter se* but also *erga omnes*, i.e. *vis-à-vis* all third parties. In turn, this would enable third parties to react to the breach of the treaty by the parties. This argument seems to find some support in the ruling of the ICJ in the *Nuclear Tests* cases. There, the Court held that a unilateral statement by a State made ‘publicly and *erga omnes*’ does not have to be addressed to a particular State or to be accepted by any other State in order to produce legal effects. The ICJ concluded that such statements may be addressed ‘to the international community as a whole’ and therefore create obligations.<sup>37</sup> Yet, the Court did not give ‘the slightest hint that other States should have been entitled to challenge the French nuclear tests’,<sup>38</sup> in the sense of its *Barcelona Traction* case *dictum*. In other words, the use of the term *erga omnes* ‘did not entail any specific legal consequences’ and therefore ‘seems to have been used in a merely descriptive way’.<sup>39</sup> Based *inter alia* on this precedent, the ILC specified in its guiding principles on the unilateral acts of States that ‘unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities’.<sup>40</sup> While the ILC did not consider the hypothesis made here, namely that two States make a joint unilateral declaration by means of a bilateral treaty, from a theoretical point

<sup>37</sup> *Nuclear Tests (Australia v France)* (Judgement) [1974] ICJ Rep 253 paras 50-51 and *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457 paras 52-53.

<sup>38</sup> See C Tams (n 13) 114.

<sup>39</sup> *ibid.*

<sup>40</sup> ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto’ (2006) vol II/2 YBILC 164 (guiding principle 6).

of view this is not an idea that should be rejected. Indeed, there is no reason why more than one State, acting jointly, should not be able to make a declaration qualifying as a unilateral act through a treaty. After all, unilateral acts are ‘declarations publicly made and manifesting the will to be bound [that] may have the effect of creating legal obligations’ towards other States or even *erga omnes*. The third parties towards whom the obligation established by the unilateral act is owed would then be ‘entitled to require that such obligations be respected’.<sup>41</sup> More particularly, according to the ILC, ‘to determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise’.<sup>42</sup> In addition, a unilateral declaration entails obligations for the formulating State(s) ‘only if it is stated in clear and specific terms’. This explains that, in the event of doubt as to the scope of the obligations resulting from such a declaration, ‘such obligations must be interpreted in a restrictive manner’, considering first and foremost ‘the text of the declaration, together with the context and the circumstances in which it was formulated’.<sup>43</sup> Accordingly, if one considers that these pointers reflect positive international law, it is a matter of interpretation whether a treaty such as the Prespa Agreement may contain a joint unilateral act that establishes the obligation for the parties to this Agreement to behave in a certain manner (i.e. use the new name) in their everyday international life, including in their dealings with all other third parties. In that case, the joint unilateral act shall be read as producing – without being required to be accepted by third parties – an obligation *erga omnes* (thus, also a corresponding procedural right *omnium*). This obligation is separate from the *inter partes* obligation each party to the Prespa Agreement assumes regarding their mutual relations.

Yet, one must admit that this mainly concerns the potential legal effect of unilateral declarations than the law of treaties, including the scope of the *pacta tertii* rule. Indeed, in connexion with the discussion contained earlier in this study regarding Article 36 VCLT, it seems that the issue discussed here is not clearly addressed by this instrument. The VCLT was drafted at a time when the concept of *erga omnes* was still

<sup>41</sup> ibid 162 (guiding principle 1).

<sup>42</sup> ibid 162 (guiding principle 3).

<sup>43</sup> ibid 164 (guiding principle 7).

underdeveloped in international law. Thus, one may presume that the text of the VCLT deals exclusively with the requirements for the creation by a treaty of primary substantive obligations (or rights) *for third parties* and does not cover any substantive obligations the parties to a treaty may have towards (all) third parties or any procedural rights of third parties (*omnium*) to invoke state responsibility.

Although the scenario of an obligation that the parties owe *erga omnes* and which (i.e. the obligation) is created by means of a joint unilateral act contained in a bilateral agreement is not to be excluded altogether, the most plausible explanation is that the relevant provisions of the Prespa Agreement that establish the obligation of the parties to use the new name *erga omnes* simply qualify the material scope of their common commitment. In other words, this means that the term ‘*erga omnes*’ within the Prespa Agreement refers to how and in which contexts the obligation of the parties to use the new name must be performed. Thus, ultimately, this obligation appears to be an exclusively *inter se* (i.e. bilateral) obligation when it comes to the question of who has legal standing to invoke responsibility, including compulsory judicial settlement.<sup>44</sup> However, it is not an *inter se* obligation in terms of its performance. This suggests that the parties owe one another an obligation to use the name ‘North Macedonia’ and the relevant terminologies provided by the Prespa Agreement not only in their mutual, bilateral relations, but also in all their dealings with all third parties. At the same time, with the exception perhaps of the UN, under the auspices of which the Agreement was reached (see also below, Part 5), third parties do not seem to obtain the right to require that the obligation to use the new name be respected by the parties. Technically speaking, this obligation is not owed to them. This analysis justifies concluding that the term ‘*erga omnes*’ is used in a quite unusual and possibly also misleading way in the Prespa Agreement.

<sup>44</sup> Under art 19 of the Agreement, any dispute that arises between the Parties concerning the interpretation or implementation of this Agreement and not resolved by diplomatic means (negotiation or UNSG good offices) may be submitted to the International Court of Justice.

4. *An Agreement generating erga omnes legal effects, i.e. obligations for all third parties?*

Having argued thus far that the Prespa Agreement does not seem to establish an obligation that the parties owe *erga omnes* (i.e. to third parties), the study – considering also the *pacta tertiiis* rule – now moves on to explore the opposite and arguably more important question, namely whether this Agreement can generate *obligations* for (all) third parties with regard to the use of the new name agreed upon by Greece and North Macedonia. Three separate issues must be considered in that respect. The first argument suggested below is that, even if one admits that it reflects positive international law (which is rather questionable), the theory of objective regimes would not apply to the Prespa Agreement (4.1). The second and third arguments concern two different types of legal effects that the Prespa Agreement can arguably produce on (potentially all) third parties. The first depends on the consent of third parties and concerns the obligation to use the new name (4.2.); the second is, in principle, independent of consent and refers to a general duty not to challenge the use of the name by the parties to the Prespa Agreement (or other third parties) deriving from the concept of opposability (4.3.).

4.1. *An Agreement establishing an ‘objective’ regime?*

The concept of objective regimes has received a great deal of attention in international scholarship but remains highly controversial. It is based on the assumption that some types of treaties, namely those of a territorial character, may be valid *erga omnes*, that is to say, they produce legal effects (i.e. rights or obligations), outside of the circle of the parties to the treaty, thus for all other states (or potentially all other subjects of international law). The paternity of the theory of objective regimes seems to belong to Lord McNair who suggested that

‘we are on surer ground if we are willing to recognize that the effects of certain kinds of treaties *erga omnes* is to be attributed to some inherent and distinctive juridical element in those treaties – in some cases, the ‘dispositive’ or ‘real’ character of the transaction effected by the treaty, the permanent nature of the rights created by or in pursuance to the treaty –

in others, the semi-legislative authority of groups of States particularly interested in the settlement or arrangement made'.<sup>45</sup>

The confines of this study make it impossible to discuss at length the question of objective regimes in international law.<sup>46</sup> However, a brief overview of the work of the ILC is necessary to understand how objective regimes operate as a potential exception to the relative effect produced by treaty law according to the *pacta tertiis* rule and to explore whether the concept of objective regimes is applicable in the case of the Prespa Agreement.

In its 1966 Report, the ILC considered ‘whether treaties creating so-called “objective regimes”, that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case’.<sup>47</sup> It decided to leave this question aside on the following grounds:

‘Since to lay down a rule recognizing the possibility of the creation of objective regimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article [i.e. what became Article 38 of the VCLT regarding rules in a treaty becoming binding through international custom], furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective regimes’.<sup>48</sup>

<sup>45</sup> A McNair, *The Law of Treaties* (Oxford Clarendon Press 1961) 255.

<sup>46</sup> See, *ex multis*, P Cahier, ‘Le problème des effets des traités à l’égard des États tiers’ (1974) vol 143 Recueil des Cours de l’Académie de Droit International 660 ff; B Simma, ‘The Antarctic Treaty as a Treaty Providing for an Objective Regime’ (1986) 19 Cornell J Intl L 189 ; F Salerno, ‘Treaties Establishing Objective Regimes’, in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP 2011) 225 ; SP Subedi, ‘The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States’ (1994) 37 German YB Intl L; A Proelss, ‘Article 34’, in O Dörr, K Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2nd edn, Springer 2018) 673 ff ; M Fitzmaurice, ‘Third Parties and the Law of Treaties’ (2002) 6 Max Planck YB United Nations L 37, 66 ff.

<sup>47</sup> ILC Report to the UNGA (1966) II YBILC 231 (footnotes omitted).

<sup>48</sup> *ibid.*

This is not surprising if one considers that the ILC special rapporteurs who examined the issue were in total disagreement – as much as many other ILC members were divided on this point – about the existence of objective regimes in the law of treaties. In his fifth report on the law of treaties, Sir Gerald Fitzmaurice expressed doubts about the existence of objective regimes. He observed that ‘it is not easy to see why some treaties even if they do embody “international settlements” should be regarded as having an automatic effect *erga omnes*’. While not denying that ‘in the result, they do’, the rapporteur considered it preferable to reach this conclusion

‘not on the esoteric basis of some *mystique* attaching to certain types of treaties, but simply on that of a general duty for States – which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided) – to respect, recognize and, in the legal sense, accept, the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense’.<sup>49</sup>

By contrast, in his third report on the law of treaties, his successor, Sir Humphrey Waldock, was openly in favour of the idea that certain treaties can establish an objective regime. To that end, he proposed draft Article 63,<sup>50</sup> defining such treaties in the following terms:

‘A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question’.

At the same time, the special rapporteur suggested that a State which is not a party to a treaty, and which expressly or tacitly consents to the

<sup>49</sup> ‘Fifth Report on the Law of Treaties (Treaties and Third States) by Sir Gerald Fitzmaurice, Special Rapporteur’ UN Doc A/CN.4/13 (1960) II YBILC 98.

<sup>50</sup> ‘Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur’ UN Doc A/CN.4/167 and Add.1-3 (1964) II YBILC 26-27.

creation or application of an objective regime, or a State which does not protest timely against or otherwise manifest its opposition to the regime, should be considered to have accepted (possibly implicitly) the regime.<sup>51</sup> However, the contradiction in Waldock's proposal is quite obvious. Indeed, if the effects of a treaty of this kind depend ultimately on the explicit or implicit acceptance of the regime by a third State, they cannot be considered as objective or valid *erga omnes*. Considering also that this idea of a treaty establishing an objective regime has been envisaged as a potential exception to the *pacta tertiiis* rule, the only possible understanding of the term 'objective' is that a treaty between a number of States can, *as such*, generate legal effects (rights or obligations) for all other states (*i.e.* *erga omnes*). Most importantly, such effects shall *not depend* on the subjective attitude (such as, for instance, recognition) of third parties towards the treaty. Indeed, as the ICJ made clear in a similar context:

‘fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing *objective* international personality, and not merely personality *recognized* by them alone, together with capacity to bring international claims [...]’.<sup>52</sup>

The argument suggested in this study with respect to objective regimes concurs with the views of scholars who have thoroughly discussed the examples or precedents invoked to support the theory (such as, *ex multis*, neutralisation, navigational or denuclearisation treaty regimes and, of course, Antarctica) to arrive at the conclusion that the concept of objective regimes is merely a doctrinal creation.<sup>53</sup> As a matter of fact, no real exception to the *pacta tertiiis* rule has ever been internationally recognised, with the possible exception of the objective personality of the UN mentioned above. In particular, the legal effects (rights or obligations) of territorial treaties or settlements for third parties are always based either on their consent and acceptance, in accordance with the mechanism provided by Articles 35 and 36 VCLT (see also Part 4.2), or on the emergence of a customary rule having an identical content with

<sup>51</sup> *ibid.*

<sup>52</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 185 (emphasis added).

<sup>53</sup> See P Cahier (n 46) 676-677; A Proelss, ‘Article 34’ (n 46) 673 ff, 693.

these treaties, according to Article 38 of the VCLT.<sup>54</sup> None of these cases establishes an exception to the *pacta tertiis* rule because it is not the treaty *as such* that creates legal effects for a third party.<sup>55</sup>

Moreover, even if one adheres to the theory of objective regimes in its pure – which, in essence, is the only conceivable – form, i.e. that a treaty may produce rights and obligations for all third parties, without their consent, said theory does not seem to be applicable in the case of a bilateral agreement such as the one under consideration. The main reason for that is that, in principle, only territorial regimes or settlements in the general interest – as these are most of the time defined by powerful states – fall within this theory. The Prespa Agreement, as a bilateral treaty settling a very particular dispute, does not fit in with the traditional understanding of the concept of objective regimes. First, while the settlement of a dispute between two States serves peace and security, it is rather difficult to assert that every settlement of this kind creates a situation in the general interest that would automatically generate obligations or rights for all third parties. Second, and most importantly, with the Prespa Agreement, the two parties confirm their common existing frontier as an enduring and inviolable international border and assume the obligation not to assert or support any irredentist territorial claims or claims for a change of their frontier.<sup>56</sup> However, this Agreement is not a territorial treaty, i.e. of a dispositive character, that would develop as such an operability effect *erga omnes* (see however Part 4.3). In conclusion, the Prespa Agreement cannot be deemed to have established an objective legal situation that would result in all third parties being under an obligation to use the new name ‘North Macedonia’ without their consent being necessary to that effect. This is also evidenced by the fact that, as is shown below, the Agreement establishes a different framework with regard to the legal position of third parties as far as the use of the new name is concerned.

<sup>54</sup> ‘Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such’.

<sup>55</sup> See eg A Proelss, ‘Article 34’ (n 46) 679-681 (with further references).

<sup>56</sup> See arts 3 and 4 of the Agreement, which are both quite detailed.

#### 4.2. An Agreement designed to establish specific obligations *omnium, ie for all third parties with their consent?*

A treaty between certain States may be intended to produce legal effects for third parties, and potentially develop *erga omnes* effects, in the sense that all third parties would be bound by an obligation contained in that treaty, provided that they expressed their consent to that effect. In the lines that follow it is examined whether this is the case of Article 1(6) of the Prespa Agreement, which reads:

'In particular, immediately upon entry into force of this Agreement, the Second Party shall:

- a) Notify *all* international, multilateral, and regional Organizations, institutions and fora of which it is a member of the entry into force of this Agreement, and request that *all* those Organizations, institutions and for thereafter shall adopt and use the name and terminologies referred to in Article 1(3) of this Agreement for *all* usages and all purposes. Both Parties shall also refer to the Second Party in accordance with Article 1(3) in *all* communications to, with, and in those Organizations, institutions and fora;
- b) Notify all Members States of the United Nations of the entry into force of this Agreement and shall request them to adopt and use the name and terminologies referred to in Article 1(3) of this Agreement for *all* usages and *all* purposes, including in *all* their bilateral relations and communications' (emphasis added).

How should one interpret these provisions? Can we infer a common intention of the parties to create an obligation *omnium*, that is to say, for *all* international institutions and *all* States to use the new name 'for all usages and all purposes' in all their everyday international dealings, whether with the two parties to the Prespa Agreement or with third parties? Before trying to answer this question, it is useful to recall that, according to Article 35 of the VCLT, '[a]n obligation arises for a third state from a provision of a treaty if the parties intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing'.<sup>57</sup>

<sup>57</sup> Moreover, it is not necessary to distinguish between third international institutions and third States because the request is formulated in the same manner. Article 35 of the Vienna Convention of 1986 adopts similar language while it adds that the '[a]cceptance

Article 35 reflects a customary rule as far as consent is concerned<sup>58</sup> and, because the source of obligation is State consent, this provision does not establish an exception to the principle *pacta tertiis*, but constitutes instead an application of it.<sup>59</sup> Unlike Article 36 VCLT which concerns rights – a question that has been discussed earlier in this study –, Article 35 deals only with the case of a treaty that specifically identifies the third state (in the singular) which the parties intend to bind. Yet nothing prevents the parties to a treaty from intending to establish an obligation for a group of States or even for all States or other subjects of international law, that is, an obligation *omnium*. However, the nature of the obligation must be clarified. Unlike the duties that may flow from the concept of opposability stemming from general international law (see below Part 4.3), Article 35 VCLT (like Article 36 in relation to rights) seems to deal exclusively with *specific* obligations that the parties to a treaty intend to create for third parties. The obligation in question may be different from the obligations of the parties. But it may also be the same, as is the case of the Prespa Agreement that establishes the obligation to use the new name ‘North Macedonia’. Yet, for a third party to be bound, two conditions must be met: a) the parties to a treaty must intend to establish obligations for third parties and; b) third parties must explicitly accept these obligations.

Does the wording of the relevant provisions of the Prespa Agreement reveal the intention of the parties to establish a specific obligation for all third parties to use the new name? The provisions at issue use the term ‘request’. This would suggest that the parties did intend to create an obligation for all third parties to use the new name. In that respect, Article 35 of the VCLT adopts a careful formulation: the provision must be intended as a means of establishing an obligation. While the ILC did not specify how this intention could be established, it may be argued that ‘any piece of evidence, such as the preparatory work, the conduct of the States-parties, the text of the treaty, might be considered as legitimate

by the third organization of such an obligation shall be governed by the rules of that organization’.

<sup>58</sup> But, as it will be shown below, the acceptance of an obligation ‘in writing’ does not reflect customary law.

<sup>59</sup> See also A Proelss, ‘Article 35’ (n 46) 699.



means to find the intention of the parties'.<sup>60</sup> With this in mind, in the case of the Prespa Agreement it would seem rather difficult at first sight to establish the common intention of the parties. As a matter of fact, it is only one of the two contracting parties, namely North Macedonia, that has the duty to notify third parties (States and international institutions) of the entry into force of the Agreement and to request the adoption of the new name by these parties. This seems to be justified as it is this State's name that third parties are requested to adopt and use. The object of this duty of notification and request is to make third parties aware of the Agreement and the solution of the naming dispute therein, while at the same time requesting them to respect this arrangement. This act by North Macedonia may be seen as being performed on behalf of both parties to the Prespa Agreement. In other words, the provisions of the Agreement at issue seem to constitute a joint or collective unilateral act,<sup>61</sup> implying an offer or an invitation on behalf of the two contracting parties to all third parties to assume the obligation to use the new name provided by the Prespa Agreement.

Even if the Prespa Agreement contains such a unilateral offer, amounting in a sense to a request *erga omnes*, this offer must be accepted by third parties. The reason is simple: as such, a treaty cannot technically contain or create an obligation for third parties. The Agreement does not specify how such a request should be accepted, i.e. the possible forms of acceptance by third parties to use the new name. However, given the absence of a customary rule requiring the acceptance of an obligation in writing,<sup>62</sup> there is nothing to prevent third parties from accepting this request in other ways. For instance, this could be done implicitly, i.e. by using (in meetings or correspondence) the new name instead of explicitly accepting to use it by means of a formal letter. Once accepted by third parties, the dominant view is that the consent of the third party together with the joint unilateral offer by the parties to the initial agreement form a new collateral agreement.<sup>63</sup> Having said that, it is obvious that, where a treaty purports to establish an obligation for all third parties, thus, in that

<sup>60</sup> C Rozakis, 'Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law' (1975) 35 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1, 10-11.

<sup>61</sup> P Reuter, *Introduction au droit des traités* (3rd edn by P Cahier, PUF 1995) 96.

<sup>62</sup> See eg A Proelss (n 46) 705-707.

<sup>63</sup> P Reuter (n 61) 96.

sense, *erga omnes*, one cannot speak of an obligation *omnium*, unless it is established that all other third parties, States and international institutions, have accepted, in one way or another, to be bound by the obligation to use the new name. Indeed, an offer of an obligation by the parties may be made *erga omnes*, i.e. towards all, but this does not mean that it will be accepted by everyone.

The requirement of an individual reaction, either implicit or explicit, by each third party to the offer may therefore create a number of complex situations as the following examples illustrate. For instance, if a third party accepts the request, it will have the obligation to use the new name for all usages and purposes, including in all its bilateral relations with other UN Member States. This covers naturally its relations with the parties to the Prespa Agreement. However, would such a third party also have the right to demand performance by the two parties to the Agreement of their obligation to use the new name not only *vis-à-vis* this specific third party, but also *vis-à-vis* other third parties or even to demand performance of the same obligation by third parties (that have accepted to be bound by it) towards the parties or other third parties? The Agreement in its Article 1(13) specifies that:

‘In the event of mistakes, errors, omissions in the proper reference of the name and terminologies referred to in Article 1(3) of this Agreement in the context of international, multilateral and regional Organizations, institutions, correspondence, meetings and fora, as well as in all bilateral relations of the Second Party with third States and entities, *either of the Parties may request* their immediate rectification and the avoidance of similar mistakes in the future’ (emphasis added).

This provision is closely linked to the abovementioned provisions establishing the notification and request procedure and seems to suggest that only the two parties have a right (but not an obligation) to request the rectification of such errors, mistakes etc. made by third parties –at least by those that have accepted the request and assumed the obligation. However, one can consider that this right to request rectification also belongs to all third parties that have accepted the request to use the new name. Moreover, this right could be exercised in relation to mistakes and errors made not only by the parties but also by all other third parties that have accepted the request. On the other hand, it is clear that third parties



which declined the request would be under no duty to rectify any mistakes.

Moving to another scenario, Article 1(6) of the Agreement establishes that both parties should refer to North Macedonia in accordance with Article 1(3) in all communications to, with, and in organisations, institutions and fora of which North Macedonia is a member. Yet, what shall happen if one of these international institutions rejects the use of the new name? Would it have the right to object to the performance by the parties of their obligation to use the new name –in the case also of activities within its own structures?

Fortunately, all these and many other conceivable scenarios, intellectually stimulating as they may be, are rather academic. A quick search on the Internet shows that since the entry into force of the Prespa Agreement the new name is currently accepted and used by and within most international institutions (such as, *ex multis*, beyond of course the UN,<sup>64</sup> NATO<sup>65</sup> and the EU, the OECD, the WTO, ICSID etc.). Similarly, although it is impossible to confirm the individual position of all States, the new name is employed at the inter-state level by a plethora of nations, including, most importantly, the US, the UK, France, and China as this is evidenced by their respective governmental websites (as far as the somewhat ambiguous Russian reaction is concerned see below, Part 4.3). North Macedonia's new name is therefore generally and universally employed. This includes treaties that North Macedonia had already signed or ratified using one of its two previous names, though the exact procedure for changing the name on the list of the contracting parties is legally

<sup>64</sup> Within the UN, one can read that '[f]urther to the communication dated 14 February 2019 from the Permanent Mission addressed to the Protocol and Liaison Service, the country name was changed to the Republic of North Macedonia (short form: North Macedonia) from the former name of The former Yugoslav Republic of Macedonia. Effective date: 14 February 2019' see <[www.un.org/en/member-states/#gotoN](http://www.un.org/en/member-states/#gotoN)> (North Macedonia).

<sup>65</sup> As provided for in art 2 of the Agreement, North Macedonia should seek admission to NATO and the EU under its new constitutional name. Greece supported the accession invitation by NATO to 'North Macedonia' and ratified on 15 February the accession protocol which has been signed by the NATO Member States a few days earlier, on 6 February 2019. A precondition for Greece to proceed with these steps was the completion of the constitutional amendments in North Macedonia and the ratification of the Agreement by that State. The accession protocol is still not in force, as the ratification in other NATO Members States is ongoing.

uncertain.<sup>66</sup> This clearly indicates a universally accepted legal situation in international relations. Yet, the complications identified earlier in this Part of the study indirectly point to another problem that must also be examined. This problem concerns opposability.

#### *4.3. An Agreement producing an erga omnes opposability effect?*

Even if one accepts that, in terms of positive international law, a treaty cannot impose specific obligations – whether identical to those of the parties (as in our case) or different from them – to third parties without their consent, still a treaty may produce legal effects *erga omnes* of a different kind. These effects are associated with and arise from the concept of opposability. Admittedly, opposability is a rather difficult notion to conceptualise. Indeed, two different conceptions of opposability exist in international law.

In a more classical approach, opposability simply means that a legal subject is bound by a rule or act of international law. For instance, as mentioned above, a rule of customary international law is opposable *erga omnes*, i.e. it is binding all States. This explains why the terms ‘opposable’ – which is less frequently used in the international legal literature in English – and ‘binding’ are used interchangeably and as synonyms most of the time.<sup>67</sup> Moreover, the concept of opposability is often used in association with the expression of consent. A rule or situation are opposable to

<sup>66</sup> See for instance the Status of ratification of the United Nations Convention against Transnational Organized Crime, available at <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en#EndDec)>. But in the reservation made by North Macedonia in 2005 (which is available via the same link) the former constitutional name of this State is still used. In addition, while on the map of the contracting States to the ICSID Convention (<<https://icsid.worldbank.org/en/Pages/about/Member-States.aspx>>) the old name FYROM is still in use, the new name North Macedonia appears when one clicks on it (<<https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST196>>).

<sup>67</sup> For instance, in the *Free Zones of Upper Savoy and the District of Gex* case brought before the Permanent Court of International Justice, while in the English version the Court holds that ‘Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it’, the French version of the judgment states that this provision ‘n’est opposable à la Suisse, qui n’est pas partie à ce traité, que dans la mesure où elle l’a elle-même accepté’ see PCIJ Series A/B No 46, 141.

a legal subject that has in one way or another (by means of a treaty or a unilateral act, for instance) accepted to be bound by them.

The second meaning of opposability does not concern the binding character of an act or situation for a legal subject.<sup>68</sup> Instead, opposability is seen as concerning the legal effects created indirectly for all third parties by an international legal act or situation. These effects differ from the specific rights and obligations that the treaty establishes for the parties to it. This notion of opposability is favoured in some domestic legal systems (e.g. French civil law).<sup>69</sup> According to this approach, even if third parties do not accept to be bound by a treaty provision, they may still have other duties of a more general nature, namely to refrain from challenging the validity or impeding the performance by the parties of this provision, or to refrain from objecting to conduct that conforms with the provision at issue by other third parties which have accepted to be bound by it. Thus, under this particular conception of opposability, a treaty provision that binds the parties to it and third parties that accept it can be opposable to all other third parties.

The civil law dimension of opposability mentioned above is not as absent from international law as one may think. Without using the term opposability, Fitzmaurice draws a similar distinction between specific rights and duties arising from a treaty for the parties alone and general duties for all other third parties. Thus, third States are under a duty to not interfere with, or impede the due performance and execution of the treaty by the parties to it, provided that the objects of the treaty are lawful and that the treaty does not purport to deprive the third State concerned of its legal rights or impair such rights without its consent.<sup>70</sup> Discussing more particularly territorial regimes and settlements, Fitzmaurice, who, as already noted, rejected the doctrine of objective regimes, observed that third States have a general duty ‘to recognize and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*’.<sup>71</sup> Moreover, in his comments, Fitzmaurice observed that ‘it seems very doubtful whether any treaty can be

<sup>68</sup> L Chan-Tung, *L'opposabilité en droit international* (Mare & Martin 2016) 35.

<sup>69</sup> ibid 30-32 (with further references).

<sup>70</sup> ‘Fifth Report on the Law of Treaties (Treaties and Third States) by Sir Gerald Fitzmaurice, Special Rapporteur’ UN Doc A/CN.4/130 (1960) II YBILC 80 (draft Article 17).

<sup>71</sup> ibid 80-81.

regarded as having automatic effects *erga omnes*, unless the system it establishes is one that third States can simply recognize and respect without having to engage in the carrying out of *specific obligations* that would require their active consent'.<sup>72</sup> And he added that

‘what is here involved is not so much that third States will come to be bound by *obligations similar to those incumbent on the parties* under the treaties concerned, as that they will be called upon, or will find themselves obliged, to accept, or anyhow will accept, and in that sense be bound by, the situation of law or fact, or the settlement or status, created by the treaty’.<sup>73</sup>

Admittedly, some doubts about the existence and potential scope of these general duties in positive international law may be justified.<sup>74</sup> Nevertheless, the argument has been made that the duty of all international subjects to respect, tolerate or not challenge situations created by treaties entered into by other international subjects stems ultimately from the customary principle of non-intervention in the affairs of others.<sup>75</sup> Arguably, this principle covers not only matters of purely domestic jurisdiction, but also affairs settled by legal subjects through a treaty between them. In a sense, these affairs too are ‘domestic’, not of course *inter partes*, but *vis-à-vis* all other third parties, at least when the object of the treaty cannot possibly concern them in one way or another. Yet, this is not the case of the Prespa Agreement, which plainly concerns the international community, as it determines the new name of a State.

If general duties arising from opposability as defined above do exist in positive international law, it should be emphasised that these duties are obviously different from those binding the legal subjects primarily concerned by the situation. Opposability governs the condition of third parties exclusively, that is, potentially of all third parties *vis-à-vis* the parties (or even third parties accepting to be bound by the treaty). It does not concern the relation of the parties *inter se*. It is indeed essential to

<sup>72</sup> *ibid* 92 (emphasis added).

<sup>73</sup> *ibid* 97 (emphasis added).

<sup>74</sup> ‘Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur’ UN Doc A/CN.4/167 and Add.1-3 (1964) II YBILC 28.

<sup>75</sup> See also P Cahier (n 46) 662-663 (with reference to Jiménez de Aréchaga, YBILC (1964) 100).

keep in mind the distinction between, on the one hand, the *specific* legal effects – be it rights or obligations – that a treaty may *as such* intend to create (even *erga omnes*), but which require the consent of third parties (unless one adheres to the doctrine of objective regimes, see Parts 4.1 and 4.2.) and, on the other hand, the (independent of State consent) *erga omnes* effects arguably established by means of a customary international rule concerning the opposability – as this concept is understood in civil law – of every treaty entered into by a circle of states. The specific treaty provision at issue within the Prespa Agreement is the one establishing the obligation of the parties to use the new name ‘North Macedonia’ in their dealings with other third parties. But if a third party does not accept the request to use this name, would it be entitled to react to the use of the new name either by the parties or by third parties? To put this question differently, can a bilateral treaty settling a non-territorial dispute like the Prespa Agreement be opposable *erga omnes* in the sense that third parties could challenge the arrangement regarding the new name? In the affirmative, the Agreement together with the collateral agreements by means of which third parties accept the obligation to use the new name would develop an *erga omnes* opposability effect in the sense that third parties to these agreements (practically, third parties which have not accepted the request to use the new name) will be, in principle, unable to object to the performance by the parties of their treaty-based duty to use the new name (or by third parties that have accepted the request to that effect), unless of course they are otherwise entitled to do so.

On a theoretical level, we may thus be inclined to ask what the legal justification would be for a third party refusing the settlement of the naming dispute as provided for in the Prespa Agreement. What would allow a third party that refuses the request to use the new name to object to the use of this name either by the parties to the Agreement or by other third parties that have accepted the request? According to Article 20(7) of the Prespa Agreement, this treaty ‘is not directed against any other State, entity or person [...] and [...] does not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international Organizations’. However, this is not enough to exclude that an interested third party may legally challenge the Agreement if it deems that its object is contrary to its own rights. Indeed, notwithstanding the widely accepted idea that within the framework of political methods of dispute

settlement, and especially within the framework of a direct bilateral negotiation, the parties to the dispute are not bound to employ the law as a means to find a solution, there are at least two limits to the operation of the *erga omnes* opposability of a treaty to third parties. First, the rights claimed by a third party cannot be disposed of by a treaty between other parties. The classic example here is that of a boundary treaty, i.e. a territorial dispositive treaty capable of producing an *erga omnes* opposability effect in the sense that the situation created by the treaty cannot be challenged by third parties, provided these parties do not have a right or claim over the territory in question.<sup>76</sup> Two or more States cannot therefore dispose of a territorial title belonging to a third State or over which that State has a potentially valid claim.<sup>77</sup> Second, a treaty settling a dispute cannot contradict a peremptory norm (*jus cogens*). Yet, neither of these two exceptions applies to the Agreement under consideration, which is neither a boundary treaty nor, seemingly, capable of breaching a *jus cogens* rule. Of course, a treaty such as the one under consideration may incidentally have negative effects for third States. However, if it does not touch upon legal rights or claims of third parties, then political grounds alone may be advanced to challenge it. Accordingly, a third State which objects to an international act to which it is not a party, is entitled to employ legitimate political means with a view to procuring its modification or termination, but it cannot deny the legal validity of the act or claim a right to disregard it.<sup>78</sup>

These observations may help to assess the objections by third parties to the settlement of the naming dispute. Such objections are not entirely theoretical, as is shown by the case of Russia. It must be recalled that, in 1992, Russia became the first permanent member of the UN Security Council to recognise North Macedonia under its constitutional name at that time. Russia opposed the Prespa Agreement on several legal and

<sup>76</sup> See for instance A Proelss, ‘Article 34’ (n 46) 681-682.

<sup>77</sup> A well-known example of such a treaty is the Munich Agreement of 1938 concluded between Nazi Germany and the UK, France and Italy. This treaty organised the cession to Germany of the Sudeten territory of Czechoslovakia, a third State that was not party to the Agreement and upon which this Agreement was imposed by the threat of force. The nullity of this treaty was finally recognised by the Treaty of Prague signed by the Federal Republic of Germany and Czechoslovakia in 1973.

<sup>78</sup> ‘Fifth Report on the Law of Treaties (Treaties and Third States) by Sir Gerald Fitzmaurice, Special Rapporteur’ UN Doc A/CN.4/13 (1960) II YBILC 98, commenting on his draft art 19 (ibid 81).

political grounds, the main critique being that the constitutional referendum in North Macedonia that led to the ratification of the Prespa Agreement was invalid and that the Agreement has been imposed externally ‘as the leading politicians from NATO and EU member states participated in this large-scale propaganda campaign directly, freely interfering in the internal affairs of this Balkan state’ (i.e. North Macedonia). Therefore, the Agreement ‘is inconsistent with [...] international law and the Constitution of Macedonia’.<sup>79</sup> The Russian Foreign Minister Sergey Lavrov also stated that:

‘We are not against this name, and our position was articulated and announced. We ask questions about the legitimacy of this process and to what extent it is based on the desire to find a consensus between Athens and Skopje, or on what you just said - the desire of the United States to “drive” all Balkan countries into NATO as soon as possible and to put an end to any Russian influence in the region’.

And he added that:

‘Regarding the name of Macedonia, there is a UN Security Council resolution, which is part of international law, that requires respecting the constitutions of Greece and Macedonia and looking for a solution within this framework. But instead of a law-based approach involving the adoption of a law that would be signed by the president of Macedonia, a rules-based approach is being used. A rule was made up according to which, contrary to the Macedonian constitution, a decision may be signed at the level of minister rather than the presidential level, and the results of a referendum can be ignored, etc.’<sup>80</sup>

These statements do not directly convey the idea of an outright rejection by Russia of the new name agreed by means of the Prespa Agreement. Although the Russian position is based upon certain legal

<sup>79</sup> Comment by the Information and Press Department on the results of Macedonia’s referendum, The Ministry of Foreign Affairs of the Russian Federation <[www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/3363368](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3363368)> (1 October 2018).

<sup>80</sup> Foreign Minister Sergey Lavrov’s remarks and answers to media questions at a news conference on the results of Russian diplomacy in 2018 Moscow <[www.mid.ru/en/web/guest/meropriyatiya\\_s\\_uchastiem\\_ministra/-/asset\\_publisher/xK1BhB2bUjd3/content/id/3476729](http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/3476729)> (16 January 2019).

considerations, this position is explained primarily by rather geopolitical considerations. The alleged flaws in the domestic constitutional process are invoked to challenge the ‘legitimacy’ of the Agreement, the ratification of which this process enabled. What is really under fire is the Agreement itself not the constitutional amendment. Indeed, the settling of the name dispute paved the way for the accession of North Macedonia to NATO, a circumstance clearly less than favourable to Russia’s security interests. But such interests are arguably far from conferring legal standing on Russia to object to the new name or claim that the parties to the Prespa Agreement or third parties should not use the new name. The only interested third State would seem to be Bulgaria (part of the territory of which is also called Macedonia). Bulgaria’s Prime Minister in 2002, Mr Boyko Borisov,<sup>81</sup> had stated that a name such as North Macedonia ‘would be completely unacceptable, since this geographical term would include Bulgarian territories, and more specifically the region of Blagoevgrad, giving rise to irredentist territorial claims by nationalist ethnic Macedonians against Bulgaria’.<sup>81</sup> Yet, this State appears to have accepted the new name.<sup>82</sup>

In addition, it is necessary here to make a distinction between the position of a third party such as Russia *vis-à-vis* the Agreement and that of Greece before the conclusion of the Agreement. Indeed, unlike other States, Greece (as well as possibly Bulgaria at that time) was arguably entitled to react to the former constitutional name of its Balkan neighbour on the grounds mentioned above, which appear to be, if not valid, at least legally relevant. In this connection, it should also be noted that, according to certain authors, it is not the Agreement as such, but the unilateral decision of North Macedonia to accept, in accordance with the Agreement, its new name that is opposable *erga omnes*.<sup>83</sup> However, this

<sup>81</sup> See <[www.novinite.com/view\\_news.php?id=140079](http://www.novinite.com/view_news.php?id=140079)>.

<sup>82</sup> See for instance the declaration by the Bulgarian Minister of Foreign Affairs Ekaterina Zaharieva on 11 June 2019: ‘Bulgaria Will Be Watching Closely Implementation of Treaty with North Macedonia during Its EU Accession Negotiations’ <[www.mfa.bg/en/news/22329](http://www.mfa.bg/en/news/22329)>.

<sup>83</sup> N Aloupi, H Raspail, ‘Accord Grèce-République de Macédoine du Nord : la fin de la controverse sur le nom “Macédoine”?’ (2018) *Revue Générale de Droit International Public* 674 : ‘Ce qui est opposable aux tiers n’est pas tant l’accord entre la Grèce et la Macédoine que la décision macédonienne d’accepter le nom de “Macédoine du Nord”. Il s’agit donc d’un acte unilatéral, dont l’objet est une décision – et non une promesse car elle n’emporte en réalité ni droits ni obligations pour les tiers, mais

reading seems to disregard the wording of the Articles of the Agreement using the expression *erga omnes* and the other relevant provisions discussed above. Moreover, it is far from convincing. Indeed, the Agreement is manifestly premised on the idea that having North Macedonia amend its constitution (and constitutional name) was not enough to settle the naming dispute. Instead, it imposes upon the two parties, and potentially upon third parties that have accepted the request to that effect, the specific obligation to use the new name in all conceivable international contexts. From this point of view, the question is less whether the unilateral act of a State to change its constitutional name as mandated by a treaty is opposable to third parties. The key question is whether third parties may object to the use of the new name by the parties, that is, to the performance of their treaty duties. Consequently, even if one accepts that the new constitutional name of North Macedonia is opposable *erga omnes*, that would only mean that a third party is not entitled to challenge the fact that, through a constitutional amendment, this State accepted domestically the name provided for in the Agreement. Yet, this seems rather questionable too. If the choice of its constitutional name by the State in question were to be automatically opposable *erga omnes*, Greece could not have protested in the first place.

In conclusion, if the solution reached by means of a bilateral treaty is consistent with the rights of third parties, it would accordingly be opposable to them. Nevertheless, it is also true that there is no central authority in international law competent to certify situations, including the ones established by a treaty between certain parties, and thus render them objectively (i.e. independently of consent) opposable *erga omnes*. Consequently, as the customary rule (if one accepts its existence) establishing general opposability duties attached to the existence of treaty for all third parties operates on the condition that the treaty does not affect their own rights, opposability cannot be absolute or objective in international law. As usual, everything depends ultimately on the reactions of the interested third party which may challenge what has been agreed by others if it considers that the exception to the customary opposability duty applies, i.e.

comporte seulement une annonce faite à leur égard – et dont l'originalité réside dans le fait qu'il est contenu dans un accord international.<sup>7</sup> In any case, contrary to what this statement seems to imply, a unilateral promise can in principle create obligations only for its author and not for third parties.

that the treaty impinges upon its own rights. But there is possibly a means to avoid such complications. This bring us to the final issue to be considered in this study concerning the role of the UNSC in endowing with objectiveness to North Macedonia's new name.

*5. Creation of an objective legal situation, i.e. valid and opposable erga omnes through endorsement of the Agreement by the UNSC?*

With paragraph 3 of its resolution 845, the UNSC requested the Secretary General of the UN (UNSG) to keep it informed of the progress made by Greece and North Macedonia in solving their dispute. The objective of their effort was to resolve their difference and to report the outcome in good time. The UNSC decided to resume consideration of the matter in the light of the report by the UNSG. The latter informed the Council of the conclusion of the Interim Accord of 1995,<sup>84</sup> and, both the UNSC and the UNGA of the conclusion of the Prespa Agreement.<sup>85</sup> Moreover, pursuant to Article 20(5) of the Agreement

'[t]he difference and the remaining issues referred to in Security Council resolutions 817 (1993) and 845 (1993) shall be considered as having been resolved upon entry into force of this Agreement'.

Since the two parties found a solution to their problem, why should further action by the UNSC be necessary? In that respect, it should be noted that, commenting on the results of North Macedonia's referendum, the Information and Press Department of the Russian Ministry of Foreign Affairs stated that:

'As a permanent member of the UN Security Council, Russia is closely monitoring the development of this situation. We proceed from the fact that according to paragraph 3 of the UN Security Council Resolution

<sup>84</sup> Letter dated 13 September 1995, UN Doc S/1995/794 (14 September 1995) (with copies of the Accord and the attached exchange of letters thereto).

<sup>85</sup> See the aforesaid UN Doc A/73/745-S/2019/139 (14 February 2019).

845, the results of the talks between Skopje and Athens will be considered at the UN Security Council'.<sup>86</sup>

Although within the United Nations (and apparently everywhere) the new name 'North Macedonia' is already in use, the UNSC will sooner rather than later be prompted to discuss the Agreement. Admittedly, under the current political dynamics of the Council, it is unlikely that the UNSC will be able to adopt a resolution, whether for or against the Prespa Agreement. However, assuming for the sake of the argument that the UNSC adopts a resolution endorsing the Prespa Agreement, what would be the legal effects of such a resolution for the parties and for third parties? In other words, what would be the added value of such an endorsement, if any at all, to a treaty by means of which two States decided to settle their dispute?

The UNSC has in its practice endorsed agreements or other instruments of a rather uncertain nature.<sup>87</sup> The exact legal effect of such endorsements varies, depending on the context. Although it is not possible to discuss this matter in detail here,<sup>88</sup> it shall be noted that a resolution may, on the basis of Chapter VII (which is rather unlikely to be invoked in the case of the Prespa Agreement)<sup>89</sup> or of Article 25 of the UN Charter, transform the substance of an agreement into a binding decision *erga omnes*. As is well known, the ICJ held in its *Namibia* Advisory Opinion of 1971 that, in order to be binding, a UNSC resolution does not have to be based on Chapter VII. Its normative force may be based on Articles 24

<sup>86</sup> 1 October 2018, Comment by the Information and Press Department on the results of Macedonia's referendum, The Ministry of Foreign Affairs of the Russian Federation, 1822-01-10-2018, available at <[www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/3363368](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3363368)>.

<sup>87</sup> See eg and *ex multis*, S/RES/1383(2001) (6 December 2001) (endorsing the Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions) and S/RES/2231(2015) (20 July 2015) (endorsing the Joint Comprehensive Plan of Action on the Iranian nuclear issue and calling upon all Members States, regional organizations and international organizations to take such actions as may be appropriate to support its implementation).

<sup>88</sup> See also on this problem S Talmon, 'Security Council Treaty Action' (2009) 62 Revue Hellénique de Droit International 65-116, 109-111.

<sup>89</sup> Yet, in other quite exceptional circumstances, the UNSC has imposed, under Chapter VII, the terms of a treaty on a State, see S/RES/1757(2007) (30 May 2007) para 1 (regarding the establishment of the Special Tribunal for Lebanon).

and 25 of the UN Charter.<sup>90</sup> Indeed, everything depends ultimately on the language of a resolution which ‘should be carefully analysed before a conclusion can be made as to its binding effect’.<sup>91</sup> Arguably then, there is nothing to prevent the UNSC from having the intention to render binding, thus also opposable *erga omnes*, the substance of a treaty such as the one under consideration. If, for instance, the UNSC endorses the Prespa Agreement and calls upon all States and international institutions to support it, this would probably mean that the resolution is designed to render the substance of this Agreement legally binding as a matter of UN law. The UNSC could go even further by explicitly demanding that all third parties comply with the Prespa Agreement as far as the use of the new name ‘North Macedonia’ is concerned. In addition, and most importantly, a UNSC resolution endorsing the Agreement could be also understood as creating an objective legal situation that all international actors are under a duty to recognise and respect. In the *Namibia* Opinion mentioned above, the Court found that ‘the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof’<sup>92</sup>. The duty of non-recognition flowed in that case from the relevant UN resolutions terminating the mandate and thus giving rise to the unlawfulness of South Africa’s presence in Namibia, i.e. an illegal situation. Conversely, in our case, the duty of all international actors to recognise and use the new name would arise from a UNSC resolution endorsing the substance of the Agreement. The resolution shall be interpreted as establishing a new legal situation (i.e. that the name of the interested State is North Macedonia) that would be binding and opposable *erga omnes*.

<sup>90</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 paras 113-115.

<sup>91</sup> *ibid* para 114.

<sup>92</sup> *ibid* para 126.

In this scenario, a key legal consequence would be that, even if the Agreement is terminated,<sup>93</sup> the obligations provided for therein would continue to exist for the parties on another legal basis. Moreover, a resolution endorsing the Agreement would also render unnecessary the consent of third parties to be bound by the obligations provided for in the treaty, and more specifically the obligation to use the new name, as well as, of course, the possibility to challenge the use of the new name by the parties or third parties. This being explained, a potential endorsement is not capable of making *as such* the Agreement binding on third parties, as they will evidently not become formally parties to it. In other words, there is no exception here to the *pacta tertii* rule, because the endorsing resolution would be just the *instrumentum* into which the *negotium* of the treaty is transposed. Consequently, it is the new *instrumentum* which alone, depending on its language and context, would create binding obligations for all other third parties. At the same time, the endorsement, thus the incorporation as well of the substance of the Agreement into the UN legal order would clearly establish a legal interest of the UN (and perhaps of all other parties) in seeing the Agreement, and especially the obligation to use the new name as embodied also in the UNSC resolution, performed by the parties or by third parties. Therefore, unless we accept that the UN Member States have a right to challenge the legality of UNSC resolutions and to reject their legal authority, it is not unthinkable that a resolution of this kind could create an objective legal situation (i.e. that the name of the interested state *is* North Macedonia) that would be valid, binding and opposable *erga omnes*. Finally, whatever the potential legal effects of an endorsement of the Agreement by the UNSC may be, it is clear that the opposite – and seemingly more probable – scenario, namely the absence of any resolution on this issue, would not affect the legal existence of the Agreement and its potential effects on parties, and especially third parties as these questions have been discussed earlier in this study.

<sup>93</sup> Still, according to art 20(9) of the Agreement, its provisions ‘shall remain in force for an indefinite period of time and are irrevocable. No modification to this Agreement contained in Article 1(3) and Article 1(4) is permitted’. This provision raises some interesting questions regarding the admissibility of its denunciation that cannot be further examined here.

## 6. *Concluding remarks*

The Prespa Agreement offers an extremely interesting case study illustrating some complex theoretical issues concerning the potential *erga omnes* legal effects a bilateral treaty can develop, especially regarding the provisions of the Prespa Agreement on the use of the new name ‘North Macedonia’. This study has highlighted the *pacta tertiiis* rule and tried to answer the question of ‘who is bound’ by the obligation to use North Macedonia’s new name. A first conclusion to draw is that the Agreement does not seem to create an obligation *erga omnes* for the parties as their obligation to use the new name is not owed to third parties, such as States and international institutions. Accordingly, third parties are not entitled to require that the parties to the Prespa Agreement respect their obligations under this instrument. A second conclusion is that the Agreement is not a treaty establishing an objective regime capable of creating an obligation for all third parties to use the new name without their consent being necessary. This is so because the doctrine of objective regimes is questionable, but also because it would not be applicable to the Prespa Agreement, which is not a territorial treaty in the general interest. A third conclusion is that third parties may accept to be bound by the obligation to use the new name, provided that the relevant provisions of the Agreement establish the intention of the two contracting parties to bind third parties by making an offer of obligation. The fourth point made in this study is that the Prespa Agreement may also develop an opposability effect *erga omnes* on the basis of a particular international customary rule pertaining to opposability. According to this rule, unless the Agreement affects the rights of third parties that do not accept to use the new name, third parties are not permitted to challenge the use of this name by the parties to the Agreement or by any other third party. A fifth conclusion to draw would be that, depending on its wording and context, a UNSC resolution endorsing the Prespa Agreement may transform the treaty-based obligation to use the new name into an obligation that would be binding and opposable *erga omnes* on the basis of UN law. Seen from a more general and theoretical point of view, the conclusions drawn from the analysis contained in this study are not particularly radical or revolutionary. Ultimately, there seems to be no true exception to the *pacta tertiiis* rule, for, *as such*, a treaty cannot create legal effects for (all) third parties, i.e. *erga omnes*, without their consent. Due to the seemingly universal

acceptance and use of North Macedonia's new name in international relations, including above all within the UN, most of these issues are rather academic, without however forgetting the potential involvement of the UNSC or the Russian position, as these have been discussed in this study.

